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No. 91-406

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

BRUCE L. WALLACE,
Respondent.

On Petition for a Writ of Certiorari to The Circuit Court of the City of Norfolk, Virginia

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in a Federal Employers' Liability Act case, a lower court's instruction indicating that OSHA noise abatement regulation is evidence of negligence, constitutes harmless error.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

This case is about Southern Railway's ("Southern's") negligence regarding the health and safety of one of its employees, and the attempt of said railroad to absolve itself of liability by asserting compliance with noise exposure regulations that establish minimum standards of care. The petitioner would have this Court believe that "This case turns on which of two federal noise exposure standards is applicable to raidroad locomotive cab employees." (Pet. at 4). To that end, the petition before this Court attempts to frame the decision below in terms of preemption, blurring the current status of federal case law on the issue in hopes of invoking the discretionary review of this Court.

ARGUMENT

I. OSHA'S NOISE REGULATIONS WERE ONE OF SEVERAL APPROPRIATE GUIDES TO THE JURY IN ITS DETERMINATION OF STANDARD OF CARE.

The issue before this Court concerns the evidentiary propriety of using an OSHA standard as "evidence" of negligence in a FELA case. There is substantial case law supporting the notion that a safety regulation, even where inapplicable as a sanction against a particular actor, may still be admissible in a court as evidence of responsibilities or duties incumbent upon that person by custom. *See, infra*, at 3-6. To this end, it has been held that the standard of care establishing negligence in FELA cases may be greater than the standards which the railroad is statutorily bound to follow. In *Henry v. District Court*, 645 P.2d 1350, 1352 (Mont. 1982), the court stated, "A railroad company is not necessarily free from negligence, even though it may have literally complied with safety statutes or rules, the circumstances may require it to do more." See also *Seaboard Coast Line Railroad Co. v. Buchman*, 358 So.2d 836 (Fla. App. 1978).

In an attempt to divert the Court's attention from the true issue, the petitioner suggests that the key determination to be made in this case is whether the Federal Railroad Administration ("FRA") or the Occupational Safety and Health Act ("OSHA") noise regulations should control with respect to the respondent's injury. The petitioner states that,

> Some courts have held that an employer's violation of an applicable safety regulation (including OSHA safety regulations) establishes negligence per se in a FELA case. (citation omitted) Other courts have held that applicable OSHA regulations provide evidence of the standard of care imposed on employers. (citation omitted).

(Pet. at 7-8). The petitioner concludes that because FELA eliminates the defense of contributory negligence

where violation of an applicable safety statute contributed to the injury or death, the key issues to be determined is whether OSHA or FRA regulations apply in this case. The petitioner asserts throughout, that although the FRA provides the preempting regulations, the Norfolk Circuit Court erroneously overrode the FRA's preemptive effect by charging the jury that OSHA was relevant as evidence of negligence. The petitioner suggests that the instruction was tantamount to subjecting the petitioner to OSHA's independent regulatory force and its statutory remedies. (Pet. at 10). This is clearly not the case.[1] The petitioner's focus on determining the applicable safety statute is misplaced, as the case before the Norfolk Court was a negligence claim brought under FELA.

The history of the FELA clearly establishes the relevance of regulatory standards as evidence of custom, regardless of their direct application to the persons or incidents at issue. This Court stated in *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958) that,

> [I]nstead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it was clear that the general congressional intent was to provide liberal recovery for injured workers (citation omitted), and it is also *clear that Congress intended*

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[1] The record before the court supports the conclusion that the petitioner was subjected to FRA regulations, not OSHA regulations. The jury was charged to address two issues against the petitioner: (1) a claim of an FRA violation and (2) a claim of negligence. (App. at 2a). Additionally, the judge gave a negligence per se claim only with respect to the FRA violation. (App. at 3a). This argument will be developed more fully throughout the body of this brief. The record establishes that the parties were scrupulous about applying the FRA as the applicable regulatory standard under which the respondent's injury was sustained. (App. at 1a-3a).

> *the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers.* (emphasis added).

Id. at 432.

The Norfolk Circuit Court's use of the OSHA standards as relevant evidence of negligence by establishing an appropriate standard of care finds support in federal case law, with respect to claims of both negligence and negligence per se. *Albrecht v. Baltimore & Ohio Railroad Company*, 808 F.2d 329, 332 (4th Cir. 1987), supports the contention that statutory standards, regardless of their direct application to a particular class of persons, may be used as evidence of negligent conduct, even where questions of preemption potentially exist. *Albrecht* involved a FELA claim in which OSHA regulations were referred to in the jury instructions on the issue of negligence. The circuit court held that "the [OSHA] regulations could be considered by [the jury] merely as one more piece of evidence on the issue of negligence.' " The jury was instructed that:

> [T]he regulations could be considered by it merely as 'one more piece of evidence on the issue of negligence.' . . . [and that] the regulations were not conclusive or binding and that the application of the regulations to the facts of the case were solely for the jury to determine, as was the weight to be given to the regulations in determining the issue of negligence.

Id. In the case at bar, the instruction was equally clear as to the limited use to be made of the OSHA standards. The Norfolk court charged the jury that:

> The foregoing [OSHA] regulations could be considered by you merely as one more piece of evidence on the issue of negligence. The regulations are not conclusive or binding on you and the application of the regulations to the facts of the case are solely for your determination as is the weight to be given to

> the regulations in determining the issue of negligence. (Pet. App. 15a-16a).

The instruciton presented by the Norfolk Circuit Court mirrored that approved in the *Albrecht* case.[2]

Although the propriety of applying an otherwise inapplicable statute as evidence in a claim of negligence per se may be disputed, such evidence is clearly admissible when the claim is one of mere negligence. The case before this Court involves a claim of mere negligence and there-

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[2] The Petitioner alleges that the instruction of the Norfolk Circuit Court was "nearly identical" to an instruction in the Fifth Circuit which was deemed to establish reversible error (Pet. at 10, note 8). Reversible error in the Fifth Circuit was based not merely on a jury instruction, but on the fact that the court allowed into evidence expert testimony of the role of OSHA regulations in general, and testimony that the regulations applied to the railroad. *Velasquez v. Southern Pacific Transportation Co.*, 734 F.2d 216, 217 (5th Cir. 1984). The circuit court explained the harmful nature of the instruction in light of the expert testimony, and a jury instruction that "incorrectly held the railroad to a specific government agency standard of care." *Id.* at 219. The jury instruction in the present case, like the instruction in *Albrecht*, is distinguishable from *Velasquez*. The Norfolk court did not specifically apply the OSHA standard of care, but instructed only that the OSHA regulations *could be* considered, as *merely one more piece* of evidence, that the regulations were *not conclusive or binding*, and finally, that the application of the regulations to the facts was solely for the jury's determination, as was the weight to be given the regulations. (Pet. App. 15a-16a). Finally, the present case is distinguishable from *Velasquez* in that no expert witnesses were relied on to establish that OSHA directly applied to the petitioner subjecting him to its statutory remedies. The expert testimony in the present case clearly establishes that the "FRA is the active component of federal law" in this case. (App. at 1a). It should also be noted that at no time in his charge did the trial court judge instruct the jury that a finding of negligence would preclude a finding of contributory negligence. If the Norfolk court was, in fact, applying OSHA regulation to the petitioner, such an instruction would have been given to the jury, because FELA eliminates contributory negligence defense where violation of an *applicable* safety statute is the cause of injury or death. *See Pratico v. Portland Terminal Co.*, 783 F.2d 255, 267 (1st Cir. 1985).

fore evidence of an otherwise inapplicable statute is appropriate.

The case of *Barger v. Mayor & City Counsel of Baltimore*, 616 F.2d 730 (4th Cir. 1980), *cert. denied* 449 U.S. 843 (1980) involved a claim of negligence per se for hearing loss under the Jones Act. The Fourth Circuit upheld as harmless error an instruction that the city's failure to comply with OSHA noise regulations on its fireboats would render it guilty of negligence per se. Unlike *Barger*, the present case involves a jury instruction that merely suggested OSHA as providing "one more piece of evidence" on the issue of negligence, as opposed to providing the sole basis on which negligence could be found. Such an instruction, if erroneous at all, certainly constitutes harmles error in light of the determination of the *Barger* court. (*See, infra* at 7).

Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231 (5th Cir. 1982), involved an employee's suit against the manufacturer of a defective product which caused the plaintiff's injury. The court noted that admission of OSHA regulations by the district court was clearly appropriate, in spite of the fact that OSHA created no federal cause of action as "the regulations were introduced as evidence of negligence and not as a basis for an independent cause of action." *Id.* at 1238. The court also concluded that although OSHA created no private right of action, "violation of an OSHA regulation is evidence of negligence or, in appropriate circumstances, negligence per se." *Id.*

Pratico v. Portland Terminal Co., supra, considered whether the doctrine of negligence per se could be applied for violations of OSHA in FELA cases. The court concluded that violations of OSHA could indeed be evidence of negligence per se in FELA cases, and stated, contrary to petitioner's repeated assertions, that "Allowing OSHA regulations to act as 'guides for the determination of standards of care,' *National Marine Service, Inc.*

v. Gulf Oil Co., 433 F. Supp. 913, 919 (E.D. La. 1977), *aff'd* 608 F.2d 522 (5th Cir. 1979), should not be viewed as expanding the liability of employers." *Pratico*, 783 F.2d at 265.

A. The Trial Court's Instruction Concerning Evidence of OSHA Standards, If Erroneous, Was Harmless Error.

Assuming, arguendo, that the trial court erred in instructing the jury that OSHA regulations were evidence of negligence, the error was harmless and should not effect the Court's disposition of this case. Review of the entire record indicates that the OSHA standards before the jury were not presented as being legally determinative or having regulatory force independent of their use as evidence of negligence. Additionally, the significance of any mistaken application of OSHA by the jury had little relevance to the outcome of the case in light of the prolonged nature of the injury sustained by the respondent.

The OSHA regulations were presented to the jury with a clear and appropriate indication of both its relevance and scope. Neither the judge's instructions nor the respondent's argument to the jury, ever stated that the OSHA regulations had direct application and independent regulatory effect on the petitioner.

The trial judge instructed the jury generally on the issue of negligence under FELA, indicating that the petitioner had a duty to exercise ordinary care to provide a reasonably safe place to work. (App. at 1a). Additionally, the judge instructed that if any amount of negligence played even the slightest part in the respondent's injury, the petitioner would be liable in money damages. (App. at 1a). The court also instructed that the petitioner had a duty to make proper inspections and tests to discover the dangers in the workplace, and take reasonable precautions. (App. at 1a-2a). The jury was charged

to consider two separate claims—"One, a negligence claim; two, a Federal Railroad Administration, and in parentheses FRA, safety regulation violation claim." (App. at 2a). The court initially instructed very generally on a claim of negligence and proceeded to instruct on the violations of the FRA safety regulations, indicating that if the court failed to find a violation, then they must find for the petitioner on that claim. (App. at 3a). Only after instructing on the FRA safety regulations did the court mention OSHA. Regarding the application of OSHA regulations to the petitioner, the court instructed the jury that it could consider the OSHA regulation merely as one more piece of evidence on the issue of negligence. (Pet. App. at 15a-16a). Contrary to the limited OSHA instruction, the court gave a very specific instruction that the FRA regulations directly applied to the petitioner and were in force and effect at the times and places in question, and that if the jury found that the petitioner violated the FRA regulation, then the petitioner was absolutely liable. (App. at 3a).

Additionally, the respondent's closing argument did not mislead the jury as to the import or relevance of the OSHA regulations. No expert testimony was offered to suggest that OSHA had direct application and independent regulatory effect on the petitioner.

In closing argument counsel for the respondent first addressed the alleged violations of FRA safety regulations, and refuted the petitioner's contention that it complied with them. (App. at 5a). The OSHA regulations were briefly and succinctly referred to only after addressing the FRA violation, and then, only as an indication of the petitioner's notice of them and the petitioner's informed decision not to cover train and engine service employees. (App. at 6a). The respondent's counsel indicated that the petitioner was aware of both the level of noise the respondent was exposed to and that the rail-

road knew of the OSHA rules regarding noise exposure, but it negligently chose not to cover the train and engine service employees. (App. at 5a-6a). He said that such actions of the railroad were unreasonable (not that OSHA had direct application and independent reglulatory effect on the petitioner) based on its failue to assess the hazards to protect its employees. (App. at 6a). Counsel concluded that the railroad failed to follow the standard of the industrial world in coming to the problem of noise and hearing, namely, to identify, abate, and protect. (App. at 7a). At no time during the closing did the respondent's attorney suggest that OSHA was directly applicable against the petitioner.

Additionally, the duration of the petitioner's harm to the respondent was so extensive that any resulting error in applying OSHA would be harmless.

The respondent began working for the petitioner in February of 1956. Not until 24 years later did the FRA issue its hearing regulations, *see* Railroad Locomotive Safety Standards and Locomotive Inspection, 45 Fed. Reg. 21,092 (1980). OSHA's noise regulations were amended in 1983, providing a detailed hearing conservation requirement to be applied when employees' exposure levels equal or exceed the 8-hour time-weighted average sound level of 85 decibels. 29 C.F.R. § 1910.95(c) (1983). The respondent retired from work in 1987. Consequently, OSHA's hearing conservation requirements, even if erroneously applied to the petitioner, could have been considered evidence of negligence in only 4 out of 31 years of employment. The resulting error clearly is not prejudicial.

For the foregoing reasons, any inappropriate admission of OSHA regulations or inappropriate application of the same to the petitioner, constitutes harmless error.

II. THE PRESENT STATE OF CIRCUIT LAW INTERPRETING OSHA'S EXEMPTION CLAUSE DOES NOT INDICATE THE NEED FOR SUPREME COURT INTERVENTION.

The petitioner's second basis for review is that there is an existing circuit split on the interpretation of section 4(b)(1) of OSHA and that the Norfolk Circuit Court has added yet another branch to the split. (Pet. at 11). Specifically, it contends that

> The federal circuits disagree on both (1) what action the "dominant" federal agency must take to effect preemption of generic OSHA regulations, and (2) the scope of . . . the "working conditions" which the dominant agency carves out of OSHA's jurisdiction by the exercise of its seperate regulatory authority.

(Pet. at 11-12).

Initially respondent notes that the Norfolk Circuit Court made no judgment as to the applicability of OSHA regulations regarding noise exposure. To this end, the decision of that court does not invoke any interpretation of section 4(b)(1) of OSHA and thus presents no opportunity for review of any "split" in the federal interpretation of preemption.

Assuming, arguendo, that this Court finds that this case presents an opportunity to consider review of OSHA's exemption clause, the respondent contends that the "split" alleged to exist is the product of petitioner's misinterpretation of existing case law.

A. Federal Circuit Distinctions in Interpreting "Exercise" Are Neither Profound Nor Unreasonable.

Even if this Court determines that the question posed in the present case turns on section 4(b)(1), it still does not warrant review, as there is no real split, and this case presents no new issues. OSHA (29 U.S.C. § 653 (b)(1)) states that,

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

The petitioner alleges that the federal circuits are split on interpreting the scope of "working conditions" (and thus the scope of the OSHA exemption) and the meaning of the word "exercise" (and thus whether preemptive regulation has occured by the dominant agency) (Pet. at 11-12). The petitioner has misinterpreted the distinctions between the circuit court interpretations with respect to application of section 4(b)(1), in an attempt to induce the Court's review of this case.

The petitioner alleges that there is profound disagreement among the federal circuits over what constitutes an "exercise" of authority by a domniant agency, pursuant to section 4(b)(1). (Pet. at 12). The petitioner further states that while some courts require that the dominant federal agency "actually promulgate regulations," other courts hold that a mere "assertion of authority in a policy statement is sufficient to displace OSHA regulations." (Pet. at 12). The petitioner relies on the cases of *Velasquez v. Southern Pacific Transportation Co., supra,* and *Southern Pacific Transportation Co. v. Usery,* 539 F.2d 396 (5th Cir. 1976), *cert. denied,* 434 U.S. 874 (1977), in support of the notion that a mere policy statement from a dominant federal agency (the FRA in this case) would constitute an exercise of authority sufficient to invoke the section 4(b)(1) exemption of OSHA.

In the case of *Southern Pacific Transporiation Co. v. Usery,* the Fifth Circuit stated that the FRA, as the dominant agency in its limited area, "[C]an displace OSHA regulations *by articulating a formal position* that a given working condition *should go unregulated or* that *certain regulations*—and no others—*should apply* to a defined subject.'" *Id.* at 392 (emphasis added). This

statement clearly suggests that, whether regulating to the exclusion of other agencies or merely choosing not to regulate, the policy statement must state its regulatory intent with specificity in order for it to have preemptive effect. The court indicated that when it is unclear from a regulation whether the statement is meant to preempt OSHA, "the scope of the exemption created by section 4(b)(1) is determined by the FRA's intent, as derived from its articulations." *Id.* at 392. The plain meaning of *Usery* is that in order for a policy statement to have preemptive effect, the statement must contain some specific "articulation" of the dominant agency's intent to regulate if the statement does not otherwise clearly regulate the working environment.[3]

In *Velasquez v. Southern Pacific*, *supra*, the Fifth Circuit was determining the scope of 4(b)(1) in light of a policy statement issued by the FRA, and concluded that "an assertion of authority in a policy statement is sufficient to displace OSHA regulations." 734 F.2d at 218. The petitioner suggests that this statement stands for the proposition that a mere "policy statement" would be sufficient to invoke 4(b)(1) (Pet. at 12), and in doing so suggests that *Valesquez* is evidence of "profound disagreement among the federal circuits." (Pet. at 12). The petitioner's narrow interpretation of the *Velasquez* holding is not supported by a closer reading of the case.

The question posed in *Velasquez*, as in this case, was whether the trial court appropriately instructed the jury regarding the use of OSHA as an evidentiary standard. The *Velasquez* court concluded that the jury instruction, in conjunction with expert testimony presented at trial, "incorrectly held that railroad to a specific government

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[3] The Eleventh Circuit interpreted *Usery* accordingly, in *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1530 (11th Cir. 1986), stating that "The dominant agency *must either promulgate regulations* governing the working condition at issue, *or articulate a policy that the condition not be regulated.*" (emphasis added).

agency standard of care." *Id.* at 219. The issue of 4(b)(1) exemption was addressed in *Velasquez* only as a consequence of a jury instruction that was absolute in its application of a particular agency standard. As a result, the court was forced to determine whether preemption had occurred so as to determine whether the instruction constituted reversible error. Subsequent interpretation of *Velasquez* by the Fifth Circuit in *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 833 F.2d 570, 576 (5th Cir. 1987), supports respondent's reading of *Velasquez*. The Fifth Circuit stated that "The sole issue in *Velasquez* was whether OSHA or FRA reguations applied to a walkway beside a track, *for purposes of a* personal injury action *jury instruction*." *Id.* (emphasis added). Conspicuously missing from the *Missouri* interpretation is any language regarding preemption.

In light of the foregoing, the *Velasquez* decision is not determinative of the status of federal preemption law, nor is it evidence of profound disagreement among the federal circuits as to what agency action amounts to exercise.

The petitioner also contends that *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913 (3d Cir. 1980), *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), *Southern Railway Co. v. Occupational Safety and Health Review Commission*, 539 F.2d 335 (4th Cir. 1976), *cert. denied*, 429 U.S. 999 (1976), and *Baltimore and Ohio Railroad Co. v. Occupational Safety and Health Review Commission*, 548 F.2d 1052 (D.C. Cir. 1976), evince a split in federal circuit interpretation of the term "exercise" when juxtaposed with *Usery* and *Velasquez*. Although the petitioner cites these cases as evidence of "profound disagreement" among the federal circuits, none preclude the interpretation of 4(b)(1) set forth in *Usery*; namely, that a policy statement may have preemptive effect if an intent to do so can be derived from its articulations.

The petitioner interprets each of the foregoing cases as holding that "the preempting agency must actually promulgate regulations, mere declaration of authority over the area is not enough." *Columbia Gas*, 636 F.2d at 916, *Donovan*, 739 F.2d at 777-778, *Southern Railway*, 539 F.2d at 337, and *Baltimore & Ohio*, 548 F.2d at 1053. (Pet. at 12). The *Southern Railway* court, responding to allegations that the exercise of any authority whatsoever by the FRA should preempt the entire field of railway safety, stated that "section 401(b)(1) does not apply where the dominant agency has regulatory authority but has failed to exercise it. 539 F.2d at 336. The court added that "the actual exercise of statutory authority *rather than its mere existence* was contemplated." *Id.* at 337 (emphasis added). The court, responding to a suggested reading of 4(b)(1) that was exceedingly broad in scope, gives no indication that a policy statement that articulated preemptive intent would not be honored by that court as an "exercise" of authority.

Donovan, citing both *Southern Railway* and *Baltimore & Ohio*, explained that section 4(b)(1) "*requires* an actual, *concrete assertion* of regulatory authority as opposed to a mere possession of authority." 739 F.2d at 778 (emphasis added). At no point did the court suggest that a "concrete assertion" could not come in the form of a policy statement. Like *Southern Railway*, *Donovan* did not indicate that a policy statement that articulated preemptive intent would not be honored as an exercise of authority.

Finally, the petitioner cites *Baltimore & Ohio*, as evidence of a split in federal circuit interpretation of the term "exercise." (Pet. at 12). Responding to a notice of proposed rulemaking by FRA and FRA's assertions of intent to adopt a comprehensive code of OSHA safety regulations, the court found that such prospective, broad statements of intent were insufficient to remove OSHA's protective veil. The court noted that it saw no congres-

sional purpose in treating a proposal to act as action itself. *Baltimore & Ohio*, 548 F.2d at 1055. The *Usery* requirement of articulating a formal position in a policy statement is in no way inconsistent with denying preemptive effect to statements which merely address prospective exercises of power or preemption.

The sum of the cases presented, regarding interpretation of the term "exercise," does not suggest "profound disagreement" on the interpretation of section 4(b)(1) as suggested by the petitioner. (Pet. at 12). The foregoing cases suggest that whether the dominant agency chooses to act by regulating or merely leaving an aspect of rail safety unregulated, it must, at least, clearly articulate a formal position regarding its intent.

B. Federal Circuit Distinctions in Interpreting "Working Conditions" Are Neither Profound Nor Unreasonable.

The second aspect of section 4(b)(1), on which the petitioner alleges "the range of opinions is even wider," deals with the preemptive scope of a dominant agency's regulation. (Pet. at 12). The scope of exemption, once authority has been exercised, hinges on the interpretation given to the term "working environment" as used in section 4(b)(1). The petitioner alleges that two interpretations of "working environment" have been adopted by the various federal circuits and that the Norfolk decision represents some third interpretation. The petitioner has misstated the distinctions between the circuit court interpretations of "working environment" in an attempt to suggest inconsistencies, thereby inducing this Court to accept the Petition For Writ Of Certiorari.

The petitioner alleges that there are two approaches to interpreting "working conditions" represented by the various circuit courts and further insists that the two interpretations are contrary. (Pet. at 13). Under the "discrete working environments" approach the scope of

the dominant agency's regulation and thus the preemption of OSHA is determined according to the particular environment being regulated. Thus, if the dominant agency regulates instrumentation in locomotive cabs, any other agencies' attempts to regulate instrumentation within the locomotive cab will be deemed preempted. Under the "discrete hazard" approach favored by *Southern Pacific v. Usery, supra*, and *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981), the scope of preemption is defined according to the "discrete hazard" being regulated. Thus, although the FRA might regulate portable fire extinguishers, OSHA's fire alarm standards would not be preempted. *Southern Pacific v. Usery, supra*, 539 F.2d at 391.

Regarding the basic issue of the existence of two differing approaches to section 4(b)(1) preemption, the respondent and the petitioner are not in disagreement. The petitioner has alleged, however, that the "discrete hazard" standard and the "discrete working environment" standard are indicative of "profound disagreement" in the interpretation and application of section 4(b)(1). (Pet. at 13). The respondent strongly disagrees.

Southern Pacific v. Usery, supra, and *PBR, Inc. v. Secretary of Labor, supra*, although both espousing a narrower "discrete hazard" approach, have clearly left the door open to applying the "discrete working environment" approach, thus broadening the scope of preemption. Specifically, *Southern Pacific v. Usery* does not *favor* the discrete hazard approach, holding instead that the scope of section 4(b)(1) preemption may be "defined either in terms of a 'surrounding' or a 'hazard' . . . ." 539 F.2d at 391. *Southern Pacific v. Usery* interpreted "working conditions" in the same manner that it interpreted "exercise" concluding that, "[T]he scope of the exemption created by section 4(b)(1) is determined by the FRA's intent, as derived from its articulations." *Id.* at 392. The court explained that "the [*Southern Ry v.*

OSHRC] court likewise interpreted section 4(b)(1) in a manner which avoided the extreme positions of the Secretary and the railroads [which suggested readings of 4(b)(1) which were, respectively, extremely narrow and broad scope.]" *Id.* at 391.

PBR addressed the issue of preemption generally, and cited the holding of *Southern Pacific v. Usery, supra,* stating that "OSHA's authority to regulate a given working condition, *defined in terms of a "surrounding" or a "hazard"*, is foreclosed only insofar as another agency has exercised its authority to regulate that working condition." 643 F.2d at 896 (emphasis added). The court appears to have applied the narrower "discrete hazard" standard; however, the court qualified its narrow approach in that instance, noting that "Since the Secretary of Transportation has in no way indicated a broader effect for regulations promulgated by his agency, section 4(b)(1) does not operate to foreclose the Secretary of Labor's exercise of authority in this case." *Id.*

Both *Southern Railway v. Usery* and *PBR, Inc. v. Secretary of Labor* suggest a clear willingness to apply either the "discrete working environments" approach or the "discrete hazards" approach, and interpret the preemptive scope of 4(b)(1) accordingly, depending on the particular regulation in question. Based on the foregoing, the respondent submits that the federal circuit "split" with which the petitioner is concerned is neither profound nor does it produce results which are inconsistent or unpredictable.

C. Decision of the Norfolk Circuit Court Was Consistent With Existing Federal Preemption Law.

Finally, the petitioner alleges that the Norfolk Circuit Court has applied a third basis of review inconsistent with either of the two addressed above. (Pet. at 14). The petitioner argues that the FRA has preempted the OSHA hearing conservation regulations by regulating

both the "discrete working environment," (i.e. the locomotive cab) and the "discrete hazard," (i.e. noise standards). (Pet. at 14). The petitioner further states that "The Norfolk Circuit Court has, in effect, adopted the "nook and cranny" approach flatly rejected by the federal courts—that the OSHA noise regulations are not preempted simply because they are different than the competing FRA regulations." (Pet. at 14).

There is no indication to support the petitioner's allegation that the Norfolk Circuit Court made any decision whatever on the issue of preemption. (*see* Note 1, *supra* at 3). In the event that it did, the record clearly supports a finding that the FRA policy statement at issue did not articulate a clear desire to preempt OSHA on the issue of noise conservation and as such the Norfolk Circuit Court decision is in line with current federal interpretation of 4(b)(1). Below, the petitioner relied upon FRA Policy Statement, 43 Fed. Reg. 10,583 (March 1978), in support of its argument that the FRA has sufficiently exercised authority with respect to hearing conservation so as to preempt application of OSHA regulations on that subject. (Pet. at 5-6). Specifically, the petitioner cites the following statement from the Federal Register:

> FRA views the the question of occupational noise exposure of employees engaged in railroad operations, during their involvement in such operations, as a matter comprehended by the regulatory fields over which the FRA has exercised its statutory jurisdiction. FRA is therefore responsible *for determining what exposure levels are permissible, what further regulatory steps may be necessary in this area, if any, and what remedial measures are feasible when evaluated in light of overall safety considerations.* (emphasis added).

(Pet. at 5-6).

The statement cited by the petitioner, although clearly asserting authority to regulate hearing conservation in

the future, does not indicate a present intent to do so, as all reference to regulatory steps and remedial measures are made with respect to future evaluations. In addition to the foregoing, the FRA indicated the limited substantive effect of the policy with regard to preemption of OSHA, stating:

> This discussion cannot be regarded as definitive, since considerable experience in adjusting the relationship of FRA and OSHA standards will unlikely be required before an optimum Federal regulatory program can be achieved. *All statements concerning OSHA and FRA authority and the applicability of individual regulations should be regarded as statements of general principles.* (emphasis added).

43 Fed. Reg. at 10,587. The Policy Statement further stated that:

> As the primary regulatory agency concerned with railroad safety, FRA will not hesitate to adopt its own standards to assume a safe environment for railroad operations and to promote regulatory consistency.

Id.

The foregoing statements, in conjunction with the FRA's failure to regulate in the critical area of hearing conservation, support a finding that the FRA's policy statement expressed nothing more than a future intent to regulate the issue of hearing conservation. Such a finding is insufficient to preempt OSHA regulations on the subject. *Baltimore & Ohio, supra; Southern Pacific Transportation Co. v. Usery, supra.*

III. FELA'S CHOICE OF FORUM PROVISION DOES NOT PROVIDE A BASIS FOR GRANTING PETITION.

The petitioner cites, as an independent ground for granting this petition, "the potential for forum shopping in the wake of state court decisions below." (Pet. at 16).

The petitioner's dissatisfaction with FELA's forum provision does not provide grounds for granting this petition. The potential for forum shopping with respect to FELA claims has been present since the Act's inception. *Peterson v. Ogden Union Railway & Depot Co.*, 175 P.2d 744, 747 (1946) explained the purpose of 45 U.S.C. § 56:

> It was not only for his [plaintiff's] convenience and to enable him to choose a court where the expense of litigation would not be prohibitive, *but it was to give him the right to select the court in which he considers it would be most advantageous for him to bring his action.* (emphasis added).

The case law is clear that the petitioner is knocking at the wrong door with this request for relief. This Court has traditionally protected the right granted by 45 U.S.C. § 56. Regarding contractual modification of the right to choose a favorable forum, this Court indicated that the plaintiff's "right to bring suit in any eligible forum is a right of sufficient substantiality" that, pursuant to 45 U.S.C. § 55, could not be altered, even by mutual consent. *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263 (1949). This Court recognized in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 434 (1965), that "Congress, in providing for concurrent state and federal court jurisdiction and prohibiting removal of FELA cases to federal courts, has sought to protect the plaintiff's right to bring an FELA action in state court."

Finally, the railroad has available to it the doctrine of *forum non conveniens to* prevent adverse effects from forum shopping. This Court has spoken regarding application of that doctrine in *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 4-5 (1949), where it held that state courts may deny access to persons seeking recovery under FELA, "if in similar cases the State for reasons of local policy denies resort to its courts and

enforces its policy impartially, so as not to involve a discrimination against the Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution." [4] Relief from FELA's choice of forum clause should be sought not in this Court but in Congress.

CONCLUSION

The Petition for Certiorari should be denied for the reasons set forth herein.

Respectfully submitted,

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[4] At the time this claim was brought, Virginia had a statute in effect which prevented trial courts from dismissing any out-of-state actions on the ground of *forum non conveniens*. In *Caldwell v. Seaboard System R.R., Inc.*, 380 S.E.2d 910, 912-913 (Va. 1989), *cert. denied*, 110 S.Ct. 1169 (1990), the Virginia Supreme Court held that the statute was valid and that the appropriate means of redress would be before the state legislature. The Virginia legislature subsequently repealed that legislation, effective July 1, 1991.

APPENDICES

APPENDIX A

CROSS-EXAMINATION OF DR. LIPSCOMB

[572] MR. WEBSTER: Isn't it a fact, Doctor Lipscomb, that Mr. Wallace as an engineer is governed by and controlled by the Federal Railroad Administration regulations?

DR. LIPSCOMB: That's my understanding—Yes. [Objected to, as calling for a legal conclusion—Objection sustained]

[592] MR. WEBSTER: Dr. Lipscomb, in view of your experience and education, wouldn't you agree that there is no hearing conservation program specified by the Federal Railroad Administration for train and engine personnel Like Mr. Wallace?

DR. LIPSCOMB: Any hearing conservation—my understanding is that by OSHA, the agreement, the court ruling is that the FRA is the active component of federal law.

* * * *

INSTRUCTIONS BY THE COURT

[1200] Under the federal Employers' Liability Act Defendant is liable in money damages if Defendant, through its agents, servants, or employees, acting in the scope of their agency or employment, were negligent, however slight, and the negligence played any part, however small, in producing the injury for which damages are sought.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something [1201] that a reasonably careful person would do under like circumstances.

An employer such as the Defendant railroad has a continuous duty to exercise ordinary care under the circumstances to provide its employees with a reasonably

safe place to work and with reasonably safe and suitable equipment with which to work.

If a railroad fails to perform this duty, then it is negligent.

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case.

[1203] The railroad-employer must make proper inspections and tests to discover dangers in places where its employees must work, and, after ascertaining their existence, must take reasonable precautions for the safety of the employees. The employees have the right to rely on the performance of that duty by the employer and have the right to govern their actions accordingly.

Local usage and general custom of Defendant or the railroad industry do not justify or excuse negligence. Adherence to customary safety standards which the employer knew or should have known were not reasonable constitutes negligence.

[1204] The Court instructs the jury that in your deliberations you are to consider two separate claims made by Bruce L. Wallace against Southern Railway Company in this case: One, a negligence claim; two, a Federal Railroad Administration, and in parentheses FRA, safety regulation violation claim.

The rules of law that apply to these claims are different; this instruction will tell you the rules to apply.

You shall find your verdict for Bruce L. [1205] Wallace on his negligence claim if he proved by the greater weight of the evidence: One, that the railroad was negligent; and, two, that the railroad's negligence was a cause in whole or in part, however small, of Bruce L. Wallace's injuries.

If Bruce L. Wallace proved failed to prove either or both of the two elements above, then you shall find for the railroad on the negligence claim, but you then must consider the remainder of Bruce L. Wallace's claim against the railroad.

You shall find your verdict for Bruce L. Wallace on his FRA safety regulation violation claim if he proved by the greater weight of the evidence: One, that the railroad violated a FRA regulation enacted for the safety of employees, including Plaintiff; and, two, that the railroad's violation was a cause in whole or in part, however small, or Bruce L. Wallace's injuries.

If Bruce L. Wallace failed to prove either or both of the two elements above, then you shall find for the railroad on the FRA safety regulation violation claim, but you then must consider the remainder of this instruction.

If you find your verdict for Bruce L. Wallace on both the negligence claim and for the FRA safety regulation violation claim, or on the FRA safety [1206] regulation violation claim alone, then you shall proceed to determine the damages according to the instructions the Court will give you in a moment.

If Bruce L. Wallace fails to prove either the negligence claim or the FRA safety regulation violation claim, then you shall find your verdict for Defendant.

[1208] The Court instructs the jury that in force and effect at the times and places in question was the following Federal Railroad Administration regulation: 49 Code of Federal Regulations, Section 229.121 *et seq.*

And this is in quotation and parentheses.

(a) After August the 31st, 1980 the permissible exposure to a continuous noise in a locomotive cab shall not exceed an eight-hour time weighted average of 90 dBA.

The Court further instructs the jury that the regulations of the Federal Railroad Administration have the same force and effect as though prescribed in terms by statute, and they become an integral part of the Federal Employers' Liability Act, so that a violation of the regulations is the same thing as a violation of the statute.

If you find that Plaintiff has proved by the greater weigth of the evidence that the railroad was in violation of the FRA regulations, 49 C.F.R. Section 229.121, *et seq.*, with respect to the noise levels inside the locomotive

engines to which the Plaintiff was assigned [1209] at the times and places in question, and that such violations contributed in whole or in part, however small, to Plaintiff's injuries, then Defendant is absolutely liable.

For purposes of this action, injury, or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from a preponderance of the evidence in the case that any negligence of the Defendant contributed in any way toward any injury or damage suffered by the Plaintiff, you may find that such injury or damage was caused by the Defendant's act or omission.

APPENDIX B

CLOSING ARGUMENT OF MR. DONATO

[1222] On the question of the FRA, the Federal Railroad Administration, standard for noise levels, which will be given to you in the instruction, we learned, and it was uncontradicted, that Dr. Lipscomb had his own tests, that he relied on tests that he had gotten from the railroad's own people. He did not come here to deny them. That 112 decibels was the figure—there were no figures lower the railroad gave them from a test of Mr. Harris, if you remember that name being mentioned. 112 decibels times—this is the time weighted average—times the number of minutes if you took 125 crossings and multiplied that by the number of seconds, 35 or 40, you came out with what the 72 minute exposure in an eight to [1223] 10-hour day, that violated the FRA.

I believe when the Defendant opened his case he indicated that compliance with the FRA would be their case. There is no evidence in this case that supports compliance with the FRA back before 1989, back before they made the changes, back before Mr. Wallace was working as a locomotive engineer.

Now, let's talk a little bit about the negligence question. The negligence question has to be seen, in addition, in the context of some of the evidence produced by Dr. Lipscomb. I'm thinking particularly at this point of the evidence he went through called the milestones when he pointed out what the industrial world in America knew 30, 40, 50, 60, 70, into the 19th Century, what the scientific people knew, what they passed along, specifically what the railroad industry knew about noise in the workplace. And I believe that he said in 1956, I believe it was, the American Railroad Surgeon's—I can't recall the exact name of it, but it was the surgeons for the American Railroad Association or words to that effect had a meeting and all of this was discussed.

Now, why is this important to us? It's important to us because it tells you that when you ignore the information out there, and you are the company, you're [1224] the employer, and you're required to provide a safe place to work, which you are, and you choose not to do so but to ignore what's out there to learn from, then you are negligent. You're not reasonable. You're not acting in a reasonable manner. You're not taking care of business in the right way.

And so we have the question of negligence established on the basis of that.

What else do we know? We know that the railroad was generally aware of the OSHA, Occupational Health and Safety Act, rules regarding noise levels, that they knew about those, that they existed prior to any hearing conservation program of the OSHA. That came in in '84. What I'm talking about, noise levels and exposure levels.

And in fact the railroad in what can only be considered a sort of strange view of the world or following the minimum, I think, takes care—if the Government says we've got to cover these guys we'll cover them. Okay. That's OSHA. That applies to them. But it doesn't apply to the T and E people. We don't have to give them hearing protection. We don't have to give them any kind of hearing conservation. That's not required.

Is that the view, members of the jury, of someone who's acting reasonably? Is that the view of [1225] someone who is not negligent? In what way were they negligent?

They really failed to identify the problem on their own. They failed to study it. They failed to measure the sounds. They failed to go out and monitor their own equipment to see what the sounds were, what the levels were, and what was causing them. They failed to test their own employees. They had this haphazard program.

[1227] And with regard to this negligence on the [1228] part of the railroad, remember what Dr. Lipscomb said the industrial world's standard was in coming to noise and hearing, and that was, first of all, identify, abate, which is stop, and protect.

The railroad failed to do any of those things. They ignored this problem. They ignored its consequences. They ignored what happened to Bruce Wallace.